STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2004
v	No. 244935 Wayne Circuit Court
JERRY M. MILLIGAN, Defendant-Appellant.	LC No. 02-000143-01

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant, Jerry Milligan, appeals as of right his conviction following a jury trial of operating under the influence of liquor, third offense, MCL 257.6251. We affirm.

I. FACTS

On July 2, 1999, police officers Brian Harris and Gregory Morris were patrolling in uniform in a marked police car. As they patrolled, they noticed defendant driving a car, straddling two lanes of traffic and weaving. The officers followed the car for four or five blocks. The car pulled over and defendant conversed with a woman standing on a street corner. The woman got in the car and defendant drove off, again straddling two lanes of traffic and weaving. The officers watched as defendant made a turn without signaling and, based on their suspicion that defendant might be intoxicated, decided to make a traffic stop.

The officers approached the car and smelled alcohol. Officer Harris testified that defendant appeared disheveled, was glassy-eyed and slurred his speech. Harris said defendant acted "rude and arrogant." Harris asked defendant to get out of the car and defendant had such poor balance that he was unable to support his body weight without resting on the car. Defendant told the officers that he had six or seven beers. Harris determined that it would be unsafe to have defendant perform a field sobriety test in that location. He then arrested defendant for operating the vehicle while under the influence of alcohol. He ticketed defendant

for receiving and admitting a prostitute into his car.[1] The prostitute was also ticketed and released.

Defendant was taken to the police station where the officers read him his rights. Defendant refused to blow into the Data Master machine in order to perform a breath test. At trial defendant testified that he was never offered a test. A jury found defendant guilty of operating a motor vehicle under the influence of liquor, third offense. He was sentenced to one to five years imprisonment and now appeals as of right.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his counsel was ineffective for failing to object to the prosecution's reference to defendant picking up a prostitute. We disagree.

A. Standard of Review

When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

At trial, the prosecutor made reference to defendant picking up a prostitute. During her opening statement the prosecutor said, "He was straddling lanes of traffic, driving erratically, stops and picks up a prostitute, picks up a prostitute." The prosecutor also asked defendant, "Okay, what about picking up a prostitute? Did you receive a ticket for picking up a prostitute?" Finally, during closing arguments, the prosecutor referenced the prostitute stating, " . . . the defendant decides he's going to stop and pick up a prostitute. And he does. When he's pulled over, . . . for constant swerving and picking up a prostitute. He was given a ticket, irregardless of the disposition of that case, he was still given a ticket for soliciting."

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685; 122 S Ct 1843, 1850; 152 L Ed 2d 914, 927 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich

[1] This ticket was later dismissed.

App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *Bell, supra* at 929. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

We find that counsel's performance was not below an objective standard of reasonableness under prevailing professional norms. Evidence of a defendant's uncharged criminal acts may be admissible pursuant to MRE 404(b) when the prosecutor offers the evidence for the noncharacter purpose of showing the close relationship of the other acts to the crime charged; or, in other words, "[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). Here, the testimony about defendant stopping to pick up a prostitute was an integral part of the sequence of events leading to his arrest. Additionally, the fact that police observed defendant picking up a prostitute supported their decision to stop defendant.

Even if defense counsel erred in failing to object to the comments and questions about the prostitute, defendant has still failed to satisfy the second prong of the ineffective assistance of counsel test. *Bell, supra* at 929. We find that there is no reasonable probability that had testimony about defendant picking up a prostitute been excluded, the outcome of the proceedings would have been different. Police testified that when they stopped defendant, his speech was slurred, his eyes were glassy, he appeared disheveled and he was so off-balance that he could not stand without supporting himself with his vehicle. They also testified that defendant admitted to drinking six or seven beers and that they smelled alcohol when they approached his vehicle. In light of this testimony we find that the remarks about the prostitute did not affect the outcome of the proceedings.

III. REBUTTAL TESTIMONY

Defendant next argues that the prosecution should not have been allowed to elicit testimony from Officer Moore regarding whether defendant was offered a Data Master breath test on rebuttal. Defendant asserts that this testimony was improper because it could have been elicited on direct examination. We disagree.

A. Standard of Review

Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

B. Analysis

During direct examination, Officer Moore testified that defendant had refused to submit to a Data Master breath test and the prosecution elicited no further testimony on that topic.

During defendant's testimony, he stated that he was never offered a Data Master breath test. The trial court then allowed (over defendant's objection) the prosecution to recall Officer Moore. The prosecution asked Officer Moore several questions about defendant's refusal of the Data Master breath test, including whether Officer Moore was certain that he had offered defendant the test.

With regard to the proper purposes and scope of rebuttal evidence, the Michigan Supreme Court has stated: Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.... [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citations and internal punctuation omitted).

In the present case, the victim's rebuttal testimony regarding the Data Master breath test was "responsive to evidence introduced or a theory developed by the defendant," *Figgures, supra* at 399, and therefore proper. The rebuttal testimony was also proper to "contradict, repel, explain or disprove" defendant's evidence, and can be fairly described as "tending directly to weaken or impeach the same." *Id.* Defendant himself raised the issue of whether he had been offered a Data Master breath test. His theory of the case was that he was never even offered the test. Clearly evidence that defendant was offered the test is proper and the trial court did not abuse its discretion in admitting this rebuttal testimony.

IV. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues that there was insufficient evidence to support his conviction and that the trial court erred in denying his motion for a directed verdict. Further, defendant asserts that his conviction was against the great weight of the evidence. We disagree.

A. Standard of Review

A claim that the verdict was against the great weight of the evidence must be preceded by a motion for new trial before the trial court. *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990). However, a claim that a criminal verdict was based on insufficient evidence need not be. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987). Here plaintiff failed to preserve his claim that the verdict was against the great weight of the evidence. Thus we review this claim for plain error that affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo and in the light most favorable to the prosecutorto determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

B. Analysis

To support his argument that the evidence is insufficient, defendant highlights inconsistencies and weaknesses in the testimony of the police officers regarding their versions of the events that occurred on the night of the incident. However, the police officers' stories were substantially similar and they did not disagree on the issue of whether defendant appeared drunk and whether he was offered a Data Master breath test; their testimony, if believed, is sufficient. In essence, defendant's argument requires that we invade the province of the fact-finder and assess credibility; a function that we decline to undertake. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Viewed in a light most favorable to the prosecution, the testimony of the two police officers was sufficient.

Defendant's argument that his conviction was against the great weight of the evidence also fails. This issue was not preserved at trial and defendant has failed to demonstrate that a plain error exists. *Carines, supra* at 763.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette